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No. 313

# Supreme Court of the United States

OCTOBER TERM, 1952

M. C. SCHAEFER, *Petitioner,*

— vs. —

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation, *Respondents.*

## RESPONDENT McKELVY'S BRIEF DIRECTED TO PETITION FOR WRIT OF CERTIORARI

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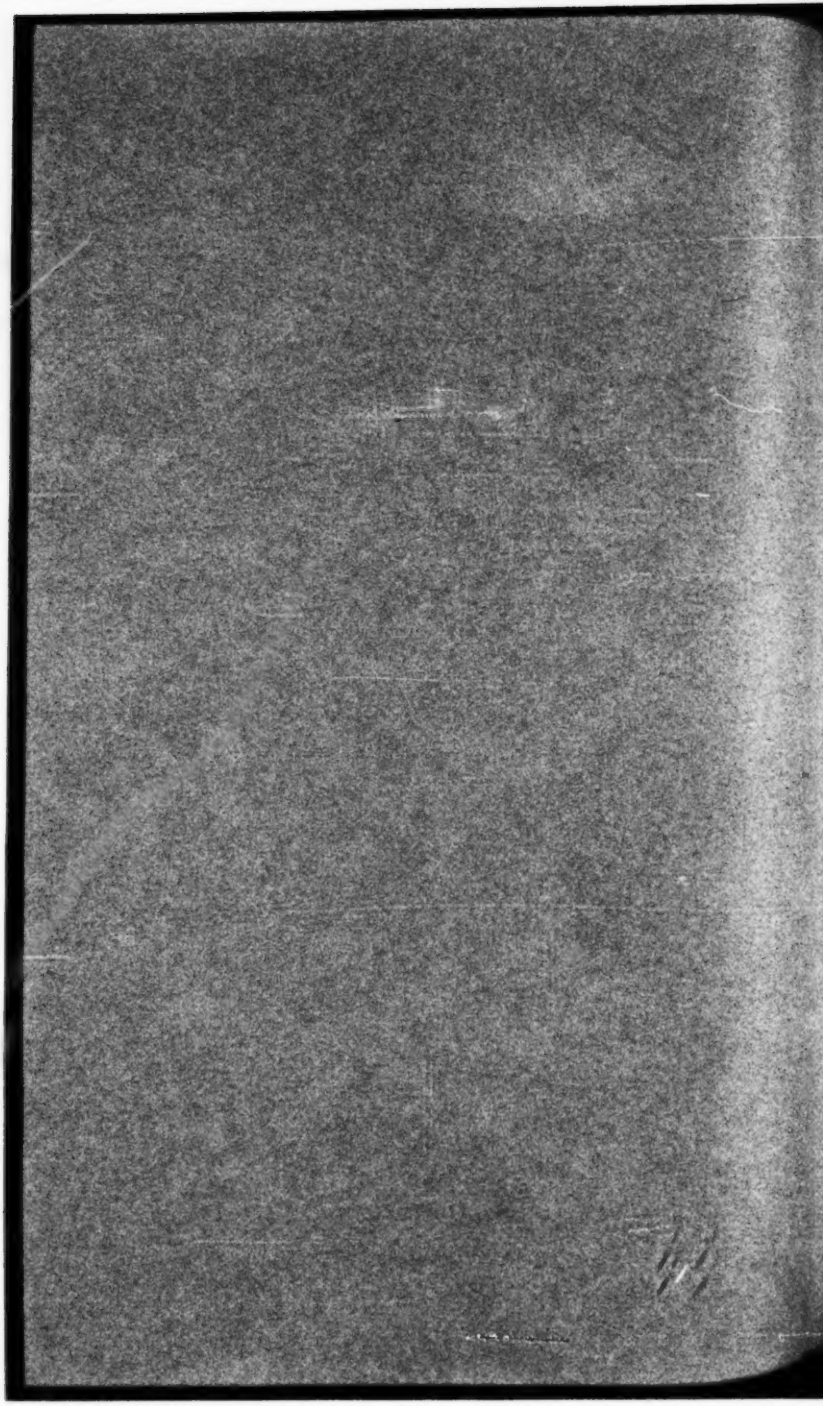

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## BRIEF OF CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# Supreme Court of the United States

OCTOBER TERM, 1952

M. C. SCHAEFER, *Petitioner*,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. MCKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation, *Respondents*.

No. 213

## BRIEF OF CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### RESTATEMENT OF THE CASE

The sole issue involved in the petition of M. C. Schaefer for Writ of Certiorari is as follows:

Does Petitioner state sufficient grounds for the issuance of the Writ?

This Respondent, in presenting a brief statement of the case, will endeavor to show the Supreme Court that there are no grounds for complaint by Petitioner in so far as judge or counsel are concerned and that there was no abuse of discretion by any judge who heard this matter.

This action was filed by the Petitioner in the United States District Court for the Western District of Washington, Northern Division, on December 1, 1950 (R. 3-12).* Respondent, Continental Casualty Company, on

* R. indicates reference to page of the Record.

December 27, 1950, filed its Motion to Dismiss on the grounds of failure to state a claim and the bar of the statute of limitations (R. 13-14). This motion came on for hearing before Judge John C. Bowen on January 9, 1951, and was assigned to visiting Judge Dal M. Lemmon (R. 15-36). The matter was heard before Judge Lemmon on January 11, 1951 (R. 215-262) and an Order dismissing the Complaint was entered on February 7, 1951 (R. 39-40). Petitioner filed his First Amended Complaint on February 9, 1951 (R. 42-182) and Respondent, Continental Casualty Company, on February 19, 1951, filed its Motion to Dismiss on the grounds of failure to state a claim, the bar of the statute of limitations and violation of Rule 8 (R. 187-195). This motion came on to be heard before visiting Judge Sam M. Driver on April 16, 1951 (R. 279-360) and an Order dismissing the Amended Complaint was entered on May 16, 1951 (R. 365-367). Petitioner filed a Second Amended Complaint on June 15, 1951 (R. 367-498) and Respondent, Continental Casualty Company, filed its Motion to Dismiss on June 25, 1951 (R. 500-501), again reciting the grounds of failure to state a claim and the bar of the statute of limitations. The Motion was heard before Judge William J. Lindberg on August 6, 1951 (R. 555-636) and the Order dismissing the Second Amended Complaint with prejudice was entered on August 7, 1951 (R. 532-534). The Order was general in form and without specification of grounds.

Petitioner thereupon perfected an appeal to the United States Court of Appeals for the Ninth Circuit (R. 535-539, 644-654). The matter came on for hearing be-

fore Circuit Judges Healy, Bone and Pope on April 9, 1952 (R. 655). On April 25, 1952, the Circuit Court rendered its opinion and judgment affirming the decision of the District Court (R. 655-658).

Petitioner thereupon filed with this Court his petition for Writ of Certiorari and supporting brief. He urges, as a ground for issuance of the Writ, the unusual and irregular conduct of the Circuit Court and four District Court judges (P. 17)* as well as the error in law of the Circuit Court in affirming the decision of the District Court, dismissing Petitioner's Second Amended Complaint.

## ARGUMENT

**1. Summary.**

It is this Respondent's position that Petitioner has stated no grounds whatsoever for the issuance of a Writ of Certiorari. It is this Respondent's contention, first, that there was no irregular conduct by any judge, and, second, that there was no error in law because the Second Amended Complaint does not state a cause of action against Respondent, Continental Casualty Company; because if a cause of action is stated, it is barred by the applicable statute of limitations in the State of Washington; because Petitioner cannot state a cause of action against this Respondent; because if a cause of action is stated, which is not barred by the statute of limitations, the Second Amended Complaint, as well as those which preceded it, is so verbose, prolix and redundant as to be subject to a Motion to Dismiss for failure to state a claim in simple, concise and direct terminolo-

* P. indicates reference to page of the Petition.

gy; and because there was no abuse of discretion in dismissing the Second Amended Complaint with prejudice.

**2. Does the Record Disclose Any Irregular Conduct by the District Courts or Appellate Court?**

There are no special and important reasons for granting Petitioner a Writ of Certiorari. The decision of the Circuit Court does not create a conflict with the decision of another Circuit Court, nor decide an important question of local law in conflict with applicable local decisions. It does not decide an important question of federal law either unsettled by this Court or in conflict with applicable decisions of this Court. Petitioner seeks to invoke the intervention of the Supreme Court on the ground that the Circuit Court departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

Analyzing the latter ground more carefully, it means that the Petitioner is seeking a Writ of Certiorari on the ground that the Circuit Court and District Courts both held against him. It is this fact which Petitioner seeks to clothe in garments of departure from the "accepted and usual course of judicial proceedings" (P. 8-17).

The first judge to come under Petitioner's attack is District Judge John C. Bowen (P. 9) who actually never heard the case in full. He made no finding that Petitioner's complaint stated a cause of action or that the statute of limitations had not run (R. 15-36). His as-

signment of the case to District Judge Dal M. Lemmon was approved by Petitioner (R. 33).

The next judge to be criticized is District Judge Dal M. Lemmon, who is alleged to have acted irregularly because he granted Respondent's Motion to Dismiss (P. 10). The record discloses the abundant advice and counsel given to Petitioner by Judge Lemmon on the proper manner of pleading a claim (R. 215-262).

The greatest amount of abuse is heaped on District Judge Sam M. Driver, who is credited with a series of "unwarranted and completely false statements" (P. 12). Nowhere in the record does Petitioner show that any remark of Judge Driver's is false. Again the record discloses considerable judicial advice given to Petitioner on the proper manner of stating a claim (R. 279-360).

Finally, Petitioner finds fault with Judge William J. Lindberg whom Petitioner quotes as having said that the complaint stated a cause of action and that the statute of limitations had not run. Petitioner cites no portion of the record to substantiate this quotation and in fact there is none (R. 637-643). Neither does the Record bear out the purported remarks by counsel for this Respondent. In fact, Petitioner attempts to cover up for the absence of such a record by including the court reporters in his attack (P. 13-14).

The Petitioner next criticizes the Circuit Court of Appeals. He first finds fault with the setting of the hearing in Seattle (P. 15) although five of six counsel were located in Seattle (R. 1). Then he infers that three Circuit Judges were compromised because they attended, on the day of argument, a luncheon of the Seattle

Bar Association at which the Judges were the guests of honor (P. 16).

Finally, Petitioner attacks the three attorneys who argued the case in the Circuit Court. None of the three acts of "reprehensible conduct" (P. 16) are substantiated by the record.

In short, Petitioner has said that a Writ of Certiorari should issue because he did not win his case in either the District Court or the Circuit Court. Because Petitioner did not prevail, Judge Bowen is accused of shirking his duty (P. 9) and participating with Judge Lemmon in a plan to throw Petitioner out of Court without a hearing on the merits (P. 10). Because Petitioner did not prevail, Judge Driver is accused of prejudice (P. 10) and of making false statements (P. 12). Because he did not prevail, Judge Lindberg is accused of incompetence (P. 13). Because he did not prevail, three Circuit Judges are accused of being compromised (P. 16), two reporters are accused of deliberately falsifying the record (P. 13, 16, 106, 113) and three attorneys are accused of reprehensible conduct (P. 16-17).

None of the allegations of the Petition are verified by the record; all are based solely on self-serving declarations and affidavits (P. 106-113, P. 9-17, R. 544, 546, 548, 397, 401, 493, 516). This Respondent contends that the allegations are wholly without foundation and afford Petitioner no basis for the issuance of a Writ of Certiorari. The record amply illustrates the infinite patience with which the lower courts heard the various motions and their attempts to guide and advise Petitioner in the proper manner of stating a claim.

After considering that Judge Lemmon had given careful attention to the first Complaint and that Judge Driver had given similar attention to the first Amended Complaint, and that Judge Lindberg had given careful attention to the Second Amended Complaint, it was certainly not an abuse of discretion on the part of Judge Lindberg to dismiss the action with prejudice; especially when Petitioner himself requested it (R. 635).

**3. Did the Circuit Court of Appeals Commit Error in Affirming the District Court?**

**a. Does the Second Amended Complaint state a cause of action against the Respondent, Continental Casualty Company?**

It appears from Paragraphs VI and VII of the Second Amended Complaint (R. 370-385) that the theory of Petitioner's Second Amended Complaint is the recovery of damages for wrongs done by the named defendants pursuant to a civil conspiracy to injure him.

It is the well established rule that the law of the State of Washington controls the decision in this case. *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L. ed. 1188. According to the law of Washington, a civil conspiracy is a combination of two or more persons, acting in concert, to accomplish an unlawful purpose or some purpose not in itself unlawful, by unlawful means.

*Dart v. McDonald,* 107 Wash. 537, 182 Pac. 628;

*Eyak River Packing Co. v. Huglen,* 143 Wash. 229, 255 Pac. 123;

*Kietz v. Gold Point Mines, Inc.*, 5 Wn.(2d) 224, 105 P.(2d) 71.

The vital elements of a civil conspiracy are:

(1) a preconceived plan to accomplish the purpose,

(2) common design to accomplish the purpose,

(3) a meeting of the minds, or agreement, to accomplish the purpose,

(4) an overt act, pursuant to the plan, to accomplish the purpose,

(5) an unlawful purpose, or use of unlawful means to accomplish it,

(6) damage resulting from the overt acts of the conspirators.

In *Sobin v. Frederick*, 236 Mich. 501, 211 N.W. 71, we find an example of Element No. 1. In that case, plaintiff, owner of a candy store, gave a mortgage on his candy stock to defendant to secure a sale of candy. The mortgagee later foreclosed his security. Plaintiff thereafter sued the mortgagee, the sheriff and the buyer at the sale for damages for alleged conspiracy. Said the Court, at page 74:

> "There can be no ex post facto conspiracy to do that which has already been done. The root principle upon which the law of conspiracy rests is a preconceived plan to unlawfully work some public or private wrong or injury by concerted action, originating in combination, either carried out by joint action, or at least, pursuant to a joint arrangement and understanding."

See, also, *Ransom v. Matson Navigation Co.* (D.C., Wash.) 1 F.Supp. 244, 246; *State of Mo. ex rel. and to*

*use of DeVault v. Fidelity and Casualty Co.*, 107 F.(2d) 343, 348.

In *U. S. v. American Column & Lumber Co.* (D.C., Tenn.) 263 Fed. 147, 151, a prosecution for conspiracy to violate the Anti-Trust Act, the Court made the following comment on Elements No. 2 and No. 3:

> "The first question arising is whether the defendants in associating themselves together under the so-called 'open competition plan,' thereby formed a combination or conspiracy. In other words, was there in the minds of two or more of the defendants a design to accomplish by and through the plan a common purpose? If so, there was a combination or conspiracy since a combination or conspiracy consists only in a mere meeting of the minds of two or more persons to accomplish a common purpose."

To the same effect, see *Mox, Inc. v. Woods*, 202 Cal. 676, 262 Pac. 302.

*Wells v. Lloyd*, 6 Cal.(2d) 70, 56 P.(2d) 517;

*Ashby v. Peters*, 128 Neb. 338, 258 N.W. 639, 99 A.L.R. 843;

*Gerdes v. Reynolds*, 30 N.Y.S.(2d) 755;

*Burton v. Maupin* (Mo. App.) 281 S.W. 83.

In the last cited case, the court adds this warning, at page 89:

> " 'The mere knowledge, acquiescence, or approval of the act, without cooperation, or agreement to cooperate, is not enough to constitute one a party to the conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.' 12 C. J. 544."

The Washington cases support the general rule cited above concerning common design and agreement. In *Dart v. McDonald, supra,* plaintiff sued defendant and wife for damages for a conspiracy to sell stock in a land development company. Defendant owned the land which he sold to the corporation for a much larger price than he paid for it. The business failed. Plaintiff was one of the unsuspecting stockholders. Defendant's wife held no stock in the corporation but plaintiff sought to hold her liable. Said the court at page 540:

> "Before Mrs. McDonald can be held liable it must be shown that she was a party to the conspiracy prior to the time the respondents subscribed for stock. It is unnecessary to cite authorities to the proposition that before a party can be held liable as a conspirator, the evidence must show that such a person entered into an agreement with the other conspirators to accomplish the object of the conspiracy."

See, also:

*Kietz v. Gold Point Mines, Inc., supra;*

*Dunlap v. Seattle National Bank,* 93 Wash. 568, 161 Pac. 364.

It is true, as stated in *Calcutt v. Gerig,* 271 Fed. 220, 222 (a case cited by Petitioner) that

> "It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts or circumstances from which the natural inference arises that the unlawul overt act was in furtherance of a common design, intention and purpose of the alleged conspirators to commit the same."

Nevertheless,

> "The mere statement that the parties conspired, or that there was a conspiracy, is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise." *Ransom v. Matson Navigation Co., supra,* at page 246.

The fourth element is the overt act, without which there can be no conspiracy.

> "The gravamen of a civil action for conspiracy is found in the overt act which results from the conspiracy and culminates in damage to the plaintiff." *Park-in Theatres, Inc. v. Paramount-Richards Theatres* (D.C., Md.) 90 F.Supp. 727, 729.

See also:

*Moffett v. Commerce Trust Co.,* 75 F.Supp. 303

*Mox, Inc. v. Woods, supra.*

In this regard, the case of *Neustadt v. Employers Liability Assurance Corp. Ltd.,* 303 Mass. 303, 21 N.E.(2d) 538 is worth noting. Plaintiff sought to enjoin three insurance companies from conspiring to take his automobile liability insurance business and in dealing with his customers directly. Demurrers were sustained, the court saying, at page 540,

> "But the effect of the charge that the defendants conspired together is to fix a joint liability on the defendants. The mere allegation that the defendants conspired with respect to the plaintiff, standing by itself does not constitute ground for civil relief. If there is no tort set out as to a single defendant, the charge of conspiracy adds nothing . . . ."

The fifth element is well stated in *Kietz v. Gold Point Mines, Inc., supra,* wherein the court quoted from 15 C.J.S. Conspiracy, 998, §3, at page 231 as follows:

> "To constitute a conspiracy the purpose to be effected by it must be unlawful in its nature or in the means to be employed for its accomplishment, and, where the object in view is lawful and no unlawful means are used, there can be no civil action for conspiracy, even though defendants acted with malicious motives."

Commenting on pleadings in a conspiracy action, the same court said in *Dart v. McDonald, supra,* at page 543,

> "It is true that it is not necessary, in order to establish the fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent only with the intent to defraud . . . . "

The sixth element concerns the damages suffered as a proximate result of the acts of the conspirators. As was well stated in *Moffett v. Commerce Trust Co., supra,* at page 304,

> "... the gist or gravamen of the action is not the conspiracy itself, but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff."

To the same effect, see:

*Park-in Theatres, Inc. v. Paramount-Richards Theatres, supra;*

*Mox, Inc. v. Woods, supra.*

In *Patten v. Dennis,* 134 F.(2d) 137, the court said that a cause of action does not consist of acts but of the unlawful violation of a right which the facts show. And in *Black & Yates Inc. v. Mahogany Association, Inc.,* 129 F.(2d) 227, 231, the court stated,

> "A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment."

Applying the legal rules stated above to the allegations of the Second Amended Complaint, it readily appears that Petitioner has failed to state a cause of action against Continental Casualty Co.

Taking the Second Amended Complaint paragraph by paragraph, Paragraph I (R. 367) refers solely to jurisdiction. Paragraph II (R. 368) is a general statement of the relationship between the parties. In this paragraph, Petitioner alleges that Continental was in the bonding business, that Clyde Philp was one of its attorneys-in-fact, that Philp was a partner of Goerig, who together were joint venturers with the Macris, that the Macris had a contract on the Roza Irrigation project, that Petitioner was a subcontractor on that job, that McKelvy was a member of the firm which acted as general counsel for Continental. Paragraph III (R. 369) recites that Continental bonded the Macris on the Roza job and that the bonds were signed by Philp. Paragraph IV (R. 369) spells out the joint venture between Philp & Goerig and the Macris. Paragraph V

(R. 370) alleges the date, March 14, 1944, on which Petitioner signed the subcontract.

At the end of Paragraph V, it is apparent that Petitioner is attempting to tie Continental with the Macris through the person of Clyde Philp, one of its attorneys-in-fact. The pure coincidence of this event is obvious. In addition, it should be noted that Philp's participation could in no way bind Continental to this joint venture, or to the acts of the joint venturers.

A case in point is *Ransom v. Dollar S. S. Line* (D.C., Wash.) 2 F.Supp. 409, wherein plaintiff sued three steamship lines for damages for conspiracy. From the pleadings, it appeared that plaintiff was on board a Matson vessel headed for Honolulu when she was removed to a Nippon Line vessel and imprisoned there by officers of the Dollar Line. Later she was removed to a Dollar vessel and taken to Seattle where she was jailed. Demurrers to the complaint were sustained. In the course of his opinion, Judge Neterer said, at page 410:

> "It has been held that a corporation cannot, in contemplation of the common law, be guilty of conspiracy . . . .
>
> "It may not be said that the employees of one company upon a ship may enter into a conspiracy with the employees of another ship or passenger agent of another ship for treatment of a passenger in the custody of the other ship and formulate a conspiracy of their several employers. Conspiracy is not within the scope of their employment . . . . The regular scope of employment is limited to conduct upon the ship and duties fairly incidental, and where it is sought to hold corporations beyond such

employment and duties fairly incidental, it must be shown by affirmative acts of the corporation through its properly functioning agency.

"Malice or unlawful or fraudulent act is the gist of the action of conspiracy .... Malice may be said to be an intent from which flows any unlawful and injurious act committed without legal justification. It extends to evil designs or a corrupt or wicked motive against someone at the time of the act. And this must come from the corporation."

From this ample quotation, it would appear that the mere fact that Philp, as attorney-in-fact for Continental, signed the Macri performance bonds could in no way commit Continental to any joint venture with the Macris. Thus the allegation which purport to tie Continental to the joint venture are without legal effect.

Paragraph VI (R. 370) is the crux of Petitioner's Second Amended Complaint. Petitioner commences this paragraph with the following words:

"That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including Au-

gust 18, 1950, said acts consisting in principal part, of the following:"

These words standing alone do not set forth a conspiracy within the meaning of the legal rules already cited. In the first place, this particular set of words is subject to the criticism against legal conclusions stated in *Black & Yates, Inc. v. Mahogany Association, Inc., supra.* To correct this obvious defect, Petitioner then attempts to set forth a series of overt acts, numbered A through K (R. 370-384). Petitioner fails, however, to correct his deficient pleading of a "preconceived plan" and agreement to injure Petitioner. Not one fact is alleged in the entire complaint which complies with the rule of *Ransom v. Matson Navigation Co., supra,* which requires the stated conclusion to be predicated on "facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise." Every attempt to set forth such facts is merely a statement of the same legal conclusion: "in furtherance of said conspiracy" (R. 370, 371, 378, 379, 381, 383 (2)) or words of similar import: "became a co-conspirator" (R. 372), "in concert with the other defendants" (R. 378). Such conclusions do not comply with the rules cited. Nowhere has Petitioner pleaded facts which show a "common design," "a preconceived plan" or "a meeting of the minds, or agreement" to accomplish the alleged purpose. For this reason alone, the Second Amended Complaint does not state facts sufficient to constitute a cause of action against Continental.

From elements No. 4 and No. 5, we know that Peti-

tioner must allege overt acts against Respondent which must be torts or which must result in an unlawful purpose. None of the eleven so-called tortious acts related by Petitioner are in fact torts. In Paragraph VI-A (R. 370) Petitioner sets out the Macris' breach of contract on the Roza project. A breach of contract is not a tort. The allegation that the breach by the Macris was participated in by Continental is a nullity as already shown. Since Philp's only contact with Continental was as attorney-in-fact, he could not bind Continental to Macri in such status. In Paragraph VI-B (R. 371), Petitioner sets out the termination of the joint venture. Surely this is not a tort. In Paragraph VI-C (R. 372-375) Petitioner relates the employment of McKelvy to sue Macri and Continental, the bonding company. This paragraph merely recites the history of dealings between Schaefer and McKelvy and shows no overt act or tort. In Paragraph VI-D (R. 375-378), Petitioner sets out his grievances against McKelvy, including his discovery that McKelvy's firm had represented Continental. The wrong alleged here, if any, is again a breach of contract, this time between attorney and client. In Paragraph VI-E (R. 378) Petitioner relates his hiring of new counsel, and full disclosure of all the facts in the suit against the Macris. No overt acts of any nature are charged. In Paragraph VI-F (R. 379), Petitioner alleges the suit filed by the Macris in Oregon against Petitioner. No reference is made to Continental. This Respondent contends that these facts do not set forth any tort.

In *Puget Sound P. & L. Co. v. Asia* (D.C., Wash.) 2

F.(2d) 491, plaintiff sought to enjoin the defendants from conspiring to force a breach of contract between the plaintiff and the City of Seattle by a suit against the city. A motion to dismiss was granted. Regarding the suit, the court said, at page 492,

> "The only act charged against defendant is the bringing of an action in the State Court, a Court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue . . . and having a right to sue the law does not inquire into the motives.
>
> "A court will not presume that a court of competent jurisdiction will permit itself to be made the instrumentality through which an unlawful purpose may be accomplished."

Further, the law of both Oregon and Washington requires, in order to establish a tort of malicious prosecution, that there be an arrest of the person or seizure of property.

> *Manhattan Quality Clothes v. Cable,* 154 Wash. 654, 283 Pac. 460;
>
> *Hoffman v. Kammel,* 142 Ore. 397, 20 P.(2d) 393.

No such facts are alleged. Therefore, this paragraph shows no overt act.

In Paragraph VI-G (R. 379-381) Petitioner sets out the commencement of his suit in Yakima. In this paragraph, he seeks to make something out of the fact that Continental advised his attorney (Olson) that Philp and Goerig were parties to the contract and hence liable thereunder. Obviously, there would have been no point

in notifying Petitioner of this fact until suit was instituted. Prior knowledge would not have affected Petitioner in any way. Petitioner thereafter relates his victory against all the defendants in both his Yakima suit and on the cross-complaint of the Macris which was the foundation of the earlier Oregon suit. No overt acts are here alleged.

In Paragraph VI-H (R. 381-383), Petitioner notes the progress of his case from the trial court to the Supreme Court of the United States. He seeks to plead overt acts of a tortious nature in applications for new trial, appeal to the Circuit Court of Appeals and *certiorari* to the Supreme Court, in none of which were any of the defendants successful. How the full and complete defense of this suit by Continental could be considered tortious is beyond reason. From Petitioner's Exhibit M (R. 438-461) attached to the Second Amended Complaint, we can easily discover Judge Driver's feelings about this case which Continental is accused of defending. Judge Driver, who tried the Yakima case, said, "Now, coming to the law applicable to this situation, it is of course difficult . . ." (R. 445); ". . . and as I read the cases while there is none that is squarely in point . . ." (R. 446); ". . . this is a close case, and the questions are close and in some respects novel ones; and if the Appellate Court should hold . . ." (R. 455); "Well, I know it is a close and difficult question . . ." (R. 459). These very statements of the trial court show both a justification for defense and an anticipation of appeal. These statements were amplified by Judge Driver at the time of the hearing on the first Amended

Complaint when he said: "It was a very complex series of cases . . ." (R. 337); "Here's a case that was a very close and difficult one, I think." (R. 338). "I thought the chances were not much more than even." (R. 338). "I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close." (R. 339). From these statements, we can see no overt act alleged in paragraph VI-H.

In Paragraph VI-I (R. 383) Petitioner seeks to make an overt act out of the refusal of Continental to delete words from its release and from the fact that its co-defendants have not paid their judgments to Continental. In fact, the words were deleted. No tort can be deduced from these allegations.

In Paragraph VI-J (R. 383-384), Petitioner alleges an attempt by McKelvy to collect a bill for services. This is not a tort. In Paragraph VI-K (R. 384) Petitioner states that he was unable to get his attorney to sue McKelvy. This is not a tort.

The last paragraph (VII) (R. 384-385) deals solely with damages, repeating again the legal conclusions regarding conspiracy.

In summary, it appears that none of the eleven alleged tortious acts are, in fact, torts. Hence, in order to state a cause of action, Petitioner must show that the purpose itself was unlawful. Here, Petitioner fails, because he has not met the requirement of pleading facts which show a "common design," "preconceived plan" or "meeting of the minds." The intent of one of the Respondents alone to injure Petitioner is not a fact which creates a conspiracy. It requires the cooperation

and confederation of two or more of the Respondents. Without this, the Petitioner has failed to show injury as a result of a conspiracy.

Briefly stated the only overt "acts" alleged are as follows:

(1) breach of contract by Macri (R. 370)

(2) breach of attorney-client contract by McKelvy (R. 372-378)

(3) Macri suit in Oregon (R. 379)

(4) defense of Schaefer suit in Yakima (R. 379-381)

(5) appeals by defendants (R. 381-383)

The termination of the joint venture (R. 371), the hiring of new counsel (R. 378), the deletion of certain words from the bonding company release (R. 383), the inability of McKelvy to collect his bill for services (R. 383-4), and the inability of Schaefer to get Olson to bring this suit (R. 384) are certainly not overt acts.

The Second Amended Complaint shows that Petitioner recovered damages for the Macri breach of contract (R. 380) and against the Macris on their cross-complaint which was the basis of the Oregon suit (R. 381). The Complaint also shows that McKelvy did not prevent Petitioner from bringing his suit (R. 378). The Complaint also shows that Petitioner recovered judgment against Continental, and his costs, all of which were paid (R. 380, 383).

Thus, it would appear that, in fact, Petitioner suffered no damage as a result of any of the five so-called overt acts. His grievance appears to be one which goes to the expense of conducting a law suit. This same ob-

servation was made by Judge Driver in the hearing on the first Amended Complaint when he said:

> "You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought." (R. 339).

It goes without citation that only certain costs of waging a law suit are recoverable. Petitioner has been paid these taxable costs. Now he seeks to recover from the losers non-taxable costs in the form of damages. Actually his damages consist of attorneys' fees and other non-taxable court costs, loss of time and profit because unable to conduct his business in the usual course while attending and preparing a law suit, and the other necessary expenses in connection therewith. These are not damages which are the proximate result of a conspiracy.

For these reasons, this Respondent contends that no cause of action has been stated against Continental Casualty Co.

**b. If any cause of action is stated, is it barred by the Statute of Limitations?**

Petitioner filed his original Complaint on December 1, 1950 (R. 12). Service was made on this Respondent some days later. The statutes of limitations of the State of Washington govern the decision herein. *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.,* 1 F. Supp.

576. In Washington, the statute of limitations continues to run until the Complaint has been both served and filed. Since there are so few days involved, let us take December 1, 1950, as the cut-off date.

In Washington there are only two possible statutes which are applicable to this case. One is R.C.W. §4.16.080 providing for a three-year limitation on certain actions. The other is R.C.W. §4.16.130 which provides:

> "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

The latter statute applies to conspiracy actions. In *Mitchell v. Greenough,* 100 F.(2d) 184, a case decided on the basis of Washington law, it was agreed by all parties that the two-year statute governed. In support of this case is *State v. Erickson,* 54 Wash. 472, 103 Pac. 796, which was a trial and conviction of the crime of conspiracy to control milk prices. Defendant, during the trial, moved to dismiss the charges on the ground that the conspiracy had ended more than two years before the information was filed. In response the court said, at page 477,

> "It is true that a prior and unsuccessful attempt had been made, but the evidence very clearly shows that there was a renewed agreement and organization which was made within one year prior to the filing of the information. This was the one upon which the present charge was based. The information was therefore filed within time."

The next question to determine is when the cause of action for damages for conspiracy accrues. One of the

clearest answers to this question is found in *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.*, 73 F.(2d) 333, 335, 97 A.L.R. 133.

> "In the instant case there are no overt acts alleged to have been committed within one year prior to the filing of the action. In *Nolle v. Oyster*, 230 U.S. 165 at page 182, 33 S.Ct. 1043, 57 L.ed. 1439, it was said to be a well-settled rule that no civil action will lie for a conspiracy unless there be an overt act that results in damage to the plaintiff. A necessary corollary to this rule would seem to be that, when there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run. If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficial purpose of the statute to fix a period to the right to sue would be defeated."

On the basis of this authority, it must next be determined whether there was an overt act committed in furtherance of the alleged conspiracy within the period of two years from December 1, 1948, to December 1, 1950.

Working backwards in Petitioner's Second Amended Complaint, the latest date alleged is October 4, 1950 (R. 384), at which time Petitioner's attorney, Olson, refused to take the present suit. Olson is not a party to this action, hence his refusal could not be an overt act of these alleged conspirators. The next date is August 18, 1950 (R. 383), when Petitioner searched Olson's files for correspondence allegedly written by

McKelvy advising Olson about the nature of the action to be brought (R. 384). If the letters were written, they would not be in aid of an alleged conspiracy, and if they were not written, the failure to do so could not be an overt act by McKelvy since his employment had been terminated October 20, 1945 (R. 377), and he would be under no duty to act. The next date alleged is August 16, 1950 (R. 383) when McKelvy attempted to collect his bill for services from Petitioner. Since McKelvy did not collect his bill on this date, there would seem to be no overt act.

The next date takes us back to November 9, 1949 (R. 383), when Continental paid the judgment. Petitioner claims an overt act in the refusal of Continental to delete certain words from its release. The fact remains, however, that the words were deleted; so again, no overt act.

There follows a series of dates regarding the appeal from the decision in the Yakima District Court. Since it is not presumed that the courts were a party to the conspiracy, the dates of decisions will be ignored and only the dates of acts by the Respondents considered. They follow in reverse chronological order:

June 20, 1949—Macri petition for Writ of Certiorari to Supreme Court (R. 382);

May 14, 1949—Continental petition for Writ of Certiorari to Supreme Court (R. 382);

March 10, 1949—Macri petition for rehearing of Circuit Court Decision (R. 382);

March 7, 1949—Continental petition for rehearing of Circuit Court Decision (R. 382);

August 18, 1947—Macri notice of appeal (R. 381);

July 29, 1947—Philp & Goerig notice of appeal (R. 381);

May 20, 1947—Continental notice of appeal R. 381);

May 9, 1947—Continental motion for new trial (R. 381).

This series of dates not only takes us beyond the two-year Statute of Limitations, but also beyond the three-year Statute. Since they are all related acts, they shall be discussed together and the importance of argument over the applicable statute of limitations diminishes.

Is it a tortious act to ask for a new trial, appeal from a decision of a trial court, petition for rehearing or seek a Writ of Certiorari in a case that the trial court describes as "close," "difficult," and "complex," and where the chance of victory is "not much more than even," and where the trial court anticipates that an appeal will follow? (See quotations, *supra.*) Certainly it is no tort. While these acts may be overt in the sense that something was done, there is nothing, inferential or circumstantial, that indicates that these legal steps were taken pursuant to a preconceived plan, common design or agreement of the parties. Hence, this Respondent contends that there were no overt acts in pursuance of a conspiracy which occurred within a period of three years before December 1, 1950, and that for this reason the cause of action is barred by the statutes of limitations without regard to whether the three- or two-year statute applies.

There are no dates alleged in the complaint, later than those heretofore mentioned. No further consideration of the pleadings are necessary for this point in the argument.

**c. Did the Circuit Court of Appeals err in affirming the Order of the District Court dismissing the Second Amended Complaint without leave to amend?**

The Second Amended Complaint was dismissed by the District Court with prejudice and without leave to amend (R. 532-534). The Circuit Court affirmed this decision. The dismissal should be affirmed where the averments of the Complaint show that the plaintiff cannot state a cause of action upon which he can recover.

*Gromacki v. Armour & Co.*, 76 F. Supp. 752.

Petitioner's original Complaint takes up 9½ pages of the Record (R. 3-12). Motions to Dismiss were heard before the Hon. Dal M. Lemmon who consumed considerable time in advising Appellant on the proper manner of pleading his cause of action (R. 214-262). Petitioner's first Amended Complaint takes up 141 pages of the Record (R. 42-182). In it, Petitioner virtually tries his entire case, setting forth almost all the evidence in his possession. The Motions to Dismiss this Complaint were heard before the Hon. Sam M. Driver who likewise spent considerable time in advising Petitioner on the proper facts to plead to make his complaint safe against motions to dismiss (R. 279-360). The Second Amended Complaint takes up 17½ pages of the Record, and has an additional 112 pages of Exhibits (R. 386-498). It is virtually the same as the first

Amended Complaint except as to form. (See Analysis, R. 528-531). At the time of the hearing of the Motions to Dismiss this Complaint, Petitioner also sought to file a paper denominated "Supplemental Complaint" (R. 516-518). By stipulation of all parties, the facts raised in this paper were to be considered in passing on the Motions to Dismiss (R. 563). The additional facts related therein seek to further prove McKelvy's representation of Continental on other occasions, and seek to add one B. J. Rask as a conspirator. All of the allegations regarding McKelvy and Continental are matters of evidence and are not material facts. The additional party is in no way associated with the other alleged conspirators by any fact or inference except the usual legal conclusion.

Considering the voluminous detail in these three complaints and the "supplemental complaint," all of which was before the Hon. William J. Lindberg in the hearing on the Motion to Dismiss the Second Amended Complaint (R. 555-636), and considering further the advice given to Petitioner by Judges Lemmon and Driver, it would appear that Petitioner has stated all of the facts which may bear on the matter in controversy and that under no possible statement of the facts, can he allege a cause of action. For this reason, the District Court did not err in its order dismissing with prejudice and without leave to amend. In fact, this order was made final at the request of Petitioner, as well as Respondents (R. 610). The affirmance of this Order by the Circuit Court was therefore proper.

**d. Does the Second Amended Complaint conform to the Rules of Civil Procedure?**

Without waiving any of the foregoing, but in the event this Court should find that Petitioner has stated facts sufficient to state a claim for relief which claim is not barred by the statutes of limitations, then in that event, the Second Amended Complaint should still have been dismissed for failure to comply with the Rules of Civil Procedure.

Rule 8 (a) requires a "short and plain statement of the claim." Rule 8 (e) (1) requires that "each averment of a pleading . . . be simple, concise and direct." The objection that a Complaint is verbose, redundant and prolix in violation of this Rule is properly taken by a Motion to Dismiss.

*Capdeville v. Am. Commercial Alcohol Corp.*, 1 F.R.D. 365;

*Buckley v. Music Corp. of America*, 1 F.R.D. 603.

Petitioner's Second Amended Complaint is verbose, redundant and prolix and subject to a Motion to Dismiss. By separating his Exhibits from the main body of the Complaint, Petitioner has in no way changed the allegations of the Second Amended Complaint from those of the first Amended Complaint. Judge Driver dismissed the latter for prolixity (R. 365-367). If the Second Amended Complaint is not to be dismissed without leave to amend, then it should still be dismissed for the same reasons as those stated in Judge Driver's opinion.

## CONCLUSION

In conclusion, it is this Respondent's position that the application for Writ of Certiorari should be denied for failure of Petitioner to present any grounds which justify the exercise of this Court's sound judicial discretion either through irregular judicial conduct or error of law in the affirmance of the lower Court's decision by the Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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